JAYAKUMAR s/o KUPPUSAMY & ANOR. v. CHEN KIT HONG & ANOR.

[O.C.J. (Mohamed Dzaiddin J.) August 8, 1983]
[Kuala Lumpur – Civil Suit No. P762 of 1981]

Practice & Procedure – Liability of joint tortfeasors – Plaintiff entitled to recover full damages from any one tortfeasor – Defendant's right of recourse to other tortfeasor for contribution – Civil Law Act, 1956 s. 10(1)(c).

Tort – Negligence – Motor accident – Liability of joint tortfeasors – Plaintiff entitled to recover full damages from any one tortfeasor – Defendant's right of recourse to other tortfeasor for contribution – Civil Law Act, 1956, s.10(1)(c)

The first and second plaintiffs sued the defendants for negligence arising out of a collision between the car driven by the first plaintiff, in which the second plaintiff was a passenger, and the lorry driven by the first defendant.

When the case came up for hearing, the parties were agreed that as between the first plaintiff and the defendants the first plaintiff was 20% to blame for the accident while as between the second plaintiff and the defendants, the defendants were wholly liable. The defendants were ordered to pay damages of $230,871.92 to the second plaintiff. The defendants claimed that they were only liable to pay the second plaintiff 80% of the damages awarded and that the second plaintiff should look to the first plaintiff to recover the 20% balance.

Held, dismissing the defendants' claim: (1) it is a rule of common law that where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. The second plaintiff is therefore entitled to seek full damages from the defendants alone without recourse to the first plaintiff at all;

(2) section 10(1)(c) of the Civil Law Act (Act 67), however, confers a right on the defendants to recover any contribution from a joint tortfeasor, in this case, the first plaintiff.

Case referred to:

Dingle v. *Associated Newspapers Ltd.* [1961] 2 Q.B. 162, 188.

CIVIL CLAIM.

C.S. Kumar (*Teh Boon Eng* with him) for the plaintiffs.

Jagjit Singh for the defendants.

Cur. Adv. Vult.

Mohamed Dzaiddin J: In this case, the first and second plaintiffs sued the defendants for negligence arising out of a collision between motorcar BAF 996 driven by the first plaintiff in which the second plaintiff was a passenger and motor lorry BAX 1378 driven by the first defendant along Jalan 8/1, Petaling Jaya, on September 10, 1979.

On June 21, 1983, the solicitors for the defendants filed a notice of indemnity and contribution against the first plaintiff claiming to be entitled to contribution from the first plaintiff any sum which the second plaintiff might recover from the defendants to the extent of the first plaintiff's liability.

On July 6, 1983, when this matter came before me, the parties by consent agreed on liability, in that, as between the first plaintiff and the defendants, the former was 20% to blame. As for the second plaintiff, the defendants admitted 100% liability and they were ordered to pay the second plaintiff the sum of $230,871.92 being general and special damages with interest and costs. Further argument on the defendants' claim for contribution against the first plaintiff was adjourned to August 8, 1983.

Mr. Jagjit Singh, counsel for the defendants, submitted that the defendants can seek contribution from the first plaintiff in respect of the second plaintiff's damages to the extent of 20% liability as agreed between his clients and the first plaintiff. He contended that the defendants will in fact be liable to pay to the second plaintiff 80% of the total award of $230,871.92 and that the balance of 20% must be recovered by the second plaintiff direct from the first plaintiff. In short, he wanted me to make an order to that effect.

In my judgment, this submission must fail. Of course, I agree that the defendants can recover contribution from the first plaintiff. This right is conferred by section 10(1)(c) of the Civil Law Act (Act 67) which says that where damage is suffered by any person as a result of a tort, any tortfeasor liable in respect of that damage may recover from any other tortfeasor whom if sued, would have been liable in respect of the same damage whether as a joint tortfeasor or otherwise. This section, however, does not empower me to make the order asked for by Mr. Jagjit. What the defendants can do, which in fact has been the practice, is to recover the balance sum (20% liability) by way of a separate action against the first plaintiff. In so far as the defendants' liability against the second plaintiff, they have still to satisfy the full amount of the judgment. It was said in *Halsbury's* Laws of England (Third Edition), Vol. 28 at paragraph 100 page 95:

"... where a person travelling as a passenger in a vehicle belonging to a third person is injured by the negligence of the defendant, he is entitled to recover in full against the latter notwithstanding that the driver of the vehicle in

which the plaintiff is travelling may also have been guilty of some negligence contributing to the accident."

As far as I am aware, this common law principle is still good law.

In *Dingle* v. *Associated Newspapers Ltd.*[1] at page 188, Devlin L.J. said as follows:

"... where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of law ..."

In the above circumstances, the defendants' application is dismissed with costs.

Order accordingly.

Solicitors: *Sri Ram, Zulkifly and Kumar; Jagjit Singh & Co.*

CHONG KHEE SANG v. PANG AH CHEE

[A.C.J. (Shankar J.) November 1, 1983]
[Johore Bahru – Civil Appeal No. 24 of 1981]

Evidence – Documentary evidence – Receipts tendered and marked as exhibits – Receipts not proved – Objection as to admissibility – Evidence Act 1950, ss. 56, 57 & 91 – Subordinate Court Rules 1950, O.19 r.8 – Subordinate Court (Amendment) Rules 1980, O.28 r.14.

Evidence – Agreed Bundle of Documents – Inclusion of document in Agreed Bundle – Effect of.

Evidence – Documentary evidence – Admissibility of – When to object.

Damages – Fatal accident – Assessment of damages – Civil Law Act, 1956, ss. 7 & 8.

Practice & Procedure – Documentary evidence – Duty of Counsel tendering documents.

On April 24, 1978 one Cheah Soi Moi ("the deceased") was killed when the motorcycle he was riding was knocked into by a motor car. On July 17, 1979 his mother commenced an action, suing the car driver as administratrix of the deceased's estate and in her own capacity as dependant, for damages under sections 7 & 8 of the Civil Law Act, 1956. In default of defence, an order was made precluding the defendant from defending the action. The case was set down for hearing for damages to be assessed.

Solicitors for both parties corresponded and were agreed on the contents of an Agreed Bundle but in the event, the plaintiff's solicitors failed to prepare and file the Agreed Bundle.

Plaintiff's counsel adverted to the oral and written consent of Defence Counsel to include the disputed receipts in the proposed Agreed Bundle. Defence Counsel qualified that his consent to include the receipts in the Agreed Bundle was not an admission that he accepted the payments as proved. The learned President, having already admitted the documents and marked them as and when they were tendered by the plaintiff in her examination-in-chief, ordered the case to proceed. No evidence was given by the plaintiff that she had disbursed the money for motorcycle repairs and funeral expenses nor did she call on the issuers of the receipts to prove the payments. The receipts were left to prove themselves.

In his assessment of damages the learned President granted $4,000/– for loss of life, of which $2,000/– went to the deceased's father and the remainder merged with the plaintiff's dependency claim. She was awarded $3,800/– under this head, future dependency of $7,920/– and special damages of $2,780/– being $2,000/– for funeral expenses, $400/– for repairs to motorcycle and $380/– for administrative and other expenses.

In his judgment, the learned President stated that to his own knowledge Chinese funerals were expensive and gave it as his opinion that $2,000/– for funeral expenses was fair and reasonable. He did not address his mind to the issue whether the expenses were proved.

The defendant appealed on the ground that the plaintiff had not proved her case.

Held: (1) a document does not become admissible in evidence merely because it has been handed to the adjudicating officer and marked as an exhibit;

(2) a document cannot be admitted into evidence and marked as such until it has been properly proved;

(3) a receipt is a document like any other and if it is to be proved as a document such proof must be given by its maker. In this case none of the receipts which the plaintiff tendered were properly proved. The plaintiff did not give evidence that she paid these monies, she did not witness payment of the monies, she did not call the people who had paid the monies, and she did not call the people who had received these monies;

(4) by not objecting to the admissibility of the documents when they were tendered in examination-in-chief but only during cross-examination, there was no waiver on